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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 11

JUNIUS C. KLEIN, - - - - - - - Appellant,

vs.

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - - Appellee.

REPLY BRIEF FOR APPELLANT.

JUNIUS C. KLEIN,
JOHN P. HASWELL,
BLAKEY HELM,
EDMUND F. TRABUE,
Counsel for Appellant.

JOHN S. MILLIKEN,
Of Counsel.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 442.

JUNIUS C. KLEIN, - - - - - - - *Appellant,*

vs.

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - - *Appellee.*

REPLY BRIEF FOR APPELLANT.

STATEMENT.

In our original brief, after complying with all the requirements of the rules of this Court (pp. 1, 4, 13), we treated the question of *equalization,* affecting about 30% of the assessment (p. 14); and we discussed (pp. 16, *et seq.*), as preliminary, or "inducement" to the main question, the taxation of property outside the State by indirection, and the unsoundness of double or multiple taxation generally. This we did upon the assumption that the Court would by reason of such discussion of those points, involving the citation of applicable authorities, be assisted in the determination of the main point involved in this case (p. 29), *viz.,* a denial to appellant of the equal protection provision of the Fourteenth Amendment.

REPLY ON OPPONENT'S CLAIMS ON EQUALIZATION.

Upon our attention's being called to it by appellee's brief (pp. 14, *et seq.*) we note that our statement in our brief (p. 15) is not as clear as it might have been. We did not mean that appellant owned land assessed at 100% while other land in Jefferson County was assessed at 69.9%, but intended to suggest that there would be a denial of equal protection if the land of one were assessed at 100% while the lands of others were habitually assessed at 69.9%, and that, therefore, the fact that the land of one was assessed *by one Board, and the land of another by a different Board,* was immaterial (*Greene, &c., v. Louisville & I. R. Co.,* 244 U. S. 499, and companion cases).

The real point on equalization, however, does rest (as appellee contends) on the construction of Kentucky Constitution, Section 171, as amended, 1915 (appellee's appendix, pp. 130-133).

It is our contention that while that section, as amended, requires levy and collection of taxes "uniform upon all property *of the same class,*" and permits the Legislature to "divide property into classes" and determine what class or classes of property shall be subject to local taxation; and may assess (if authorized by referendum) the imposition of one tax rate upon one class and a different tax rate upon another, there is no more authority *to assess values of different properties at different percentages of real value now than there was before the adoption of the Amendment of 1915,* nor

has the Legislature attempted to authorize the *assessment* of one class of property at 100% while another class is *assessed* at 69.9% of its value, nor to authorize assessors to determine what class of property shall be assessed at 100% and what other class at 69.9%, or any other per cent. Indeed, by such a scheme of unequal assessment the assessors might thwart the legislative scheme of fixing particular rates of taxation.

We submit, therefore, that there is nothing in the 1915 Amendment that takes our case out of the principle expounded by this Court in *Greene* v. *Louisville & I. R. Co., supra.*

Opponent quotes extensively Ben Marshall's deposition (brief, 24, 27, *et seq.*), apparently overlooking the *findings of law and facts* (R. 43, *47*) where the Court said:

> "The Court further finds that the only other fact presented in the case is contained in the deposition of Ben Marshall, Secretary of the State Tax Commission of the State of Kentucky, which fact *the Court finds to be* that the assessment of real estate by the assessing authorities of the State of Kentucky, in the County of Jefferson, State of Kentucky, for the year 1925, as of July 1, 1924, was had and made on the basis of 69.9% of its fair cash value, estimated at what it would bring at a fair voluntary sale thereof, and that the ratio, or average, of the assessments for taxation of real estate in all of the counties of the State of Kentucky, for said year 1924, was between 65% and 70% of the fair cash values of same." (Italics ours.)

Our claim of discrimination is based upon the finding of facts by the Trial Court, upon which the judgment of the Court of Appeals was based, and we submit that the speculations of the witness in cross and redirect examinations cannot affect the State Court's findings.

Confessedly, therefore, appellant's stock was assessed at 100%, and the findings of fact by the State Court show that land in Jefferson County was assessed at 69.9% of its fair cash value, and land in other counties of the State at between 65% and 70% of that value. There was, therefore, a denial of the equal protection of the laws to appellant to the extent of 30 or 35%.

Of course the question of equalization is only a subordinate question in case the Court should reach a conclusion adverse to our claim under the Fourteenth Amendment.

Fourteenth Amendment.

On the main point in controversy, the equal protection of the laws, we showed (Brief, 34, 35) the history of legislative provisions for taxing shares of corporate stock, reciting the legislation prior to 1917 (Ky. Stats. 4085), the Amendment of 1917 (Section 4088), and the Amendment of 1924 (Section 4088 as revised).

We showed (Brief, 29) that the discrimination between corporations in taxation upon its shareholders was serious and grievous. We showed (Brief, 30, *et seq*). that the State Court originally (in the *Siler case,* 221 Ky. 100—May 31, 1927) upheld the statute which we now assail, upon the authority of the *Middendorf*

case, 202 Ky. 118 and *Louisville Gas & Electric Co.* v. *Shanks, Auditor,* 213 Ky. 762, and that this Court (277 U. S. 32) has since the decision in the *Siler case* reversed the State Court's decision in the *Louisville Gas & Electric Co.* case. In other words, we showed that the State Court based its decision in favor of the 1924 Amendment upon its previous decision upholding the Registry Statute (a section of the Act of 1917) which this Court condemned in 277 U. S. 32. We showed also that the State Court, after this Court's decision invalidating the Registry Act, declared in the *instant case* (R. 58—230 Ky. 187) that it was unable to see that this Court's decision on the Registry Act had any application to the *instant* case.

We reviewed (Brief, 37, *et seq.*) the State Court's decision in the *instant* case, showing that its reasons for its decision of the Federal question were totally insufficient to justify the conclusion reached; and by review of the late decisions of this Court (Brief, 41, *et seq.*) we showed that the taxation of resident stockholders in some corporations, while stockholders in others were not taxed,—*a discrimination based solely upon the amount of the corporation's gross assets in the State*—violated the equal protection clause of the Fourteenth Amendment. See among other cases:

Louisville Gas & Elec. Co. v. *Coleman, Auditor,* 277 U. S. 32;
Quaker City Cab Co. v. *Pennsylvania,* 277 U. S. 389;
Liggett v. *Baldridge,* 278 U. S. 105, 113.

We showed also that the criterion of *gross assets* was as remote from a reasonable basis for discrimination as was *"authorized stock"* in *Air-Way Electric Co.* v. *Day*, 266 U. S. 71 (Brief, 42).

REPLY TO OPPONENT'S ATTACK ON SECURITY HOLDERS BASED ON MATTERS DEHORS THE RECORD.

Opponent, the Attorney General, not only assails all our positions most industriously, but expresses amazement at the lack of understanding and greed of our client. Indeed, he savagely attacks the entire class of owners of intangibles to which appellant belongs.

He declares (Brief, 44) the appellant "incapable of distinguishing between the value of an obligation of a person or a corporation and the property that is owned by that person and the corporation."

He says (p. 51):

> "* * * we can see no reason why these principles (of Kidd v. Alabama) should be overturned simply because the petted and pampered owners of intangible property desire to be freed from all obligation of contributing to the support of the State governments that give legal life, vitality, and protection to their property, and who are the first and most exacting people in demanding from the State the protection of their property rights."

He says (p. 70):

> "He cannot understand that the physical property of the corporation constitutes its assets while

a share of stock in the hands of a shareholder is a liability of the corporation."

He says (p. 70):

"Appellant at last has given this Court the reason for this suit. He thinks it a crime for Kentucky to collect from him any tax. He honestly believes that Kentucky should exempt his property, but collect taxes from the other fellow to pay the cost of protecting his property."

Why the Attorney General should become so excited, or so embittered against the appellant and his class of security holders for contesting the Commonwealth's right to impose an unconstitutional tax, is not apparent. Surely it is not improper to attack an unconstitutional tax when we see the alarming rate at which taxes are increasing, and realize that if the *ratio* of taxes to income continues to so increase disaster must overtake us.

On the *instant* point the State's general right to tax the holder of shares is assumed.

The Attorney General speaks fluently of the expensive "protection" afforded by the State to appellant's shares as if it were possible for the State to extend any such protection. Appellant's shares are valid without even a certificate, and if appellant had a certificate it might be in Kentucky, Indiana or any other State. Kentucky would not even know of its whereabouts or its existence.

The claimed "protection" which seems to have given opponent such concern, as requiring *so extensive*

an expenditure of money, could not be discovered by an ordinary imagination. But, as aforesaid, we are assuming here the State's general right to tax shares.

The Attorney General criticizes appellant and his class as "petted and pampered owners of intangible property," and as "most exacting" in demanding the State's "protection" thereof, but he was compelled to admit that the Legislature in 1917 found it necessary to limit the tax upon intangible property *in order to get any to protect. The State ran after intangibles, and its speed was such* that intangibles increased from $68,750,880 in 1917 to $246,358,379 in 1918, and $495,506,610 in 1928 (appellee's Brief, 4). The Attorney General (Brief, 5) unwittingly explains that intangibles pay 50c in Louisville while tangibles pay $3.05. Of course, a $100 bond bearing $3.50, $4.00, $4.50 or $5.00 interest cannot pay $3.05 taxes! The Commonwealth, therefore, was driven to appoint a Committee to study and report, and to call its Legislature in *extra session* to devise means to bring into Kentucky that "petted and pampered" capital so essential to the development of the State, and so important as property to be taxed.

The taxation of $495,506,610 (almost $500,000,000) afforded a great relief to tangible property, which without the intangibles must have borne the burden of governmental expenses alone.

We apologize, however, for noticing such extraneous matters, and promise not to so offend again.

EXPLOSION OF OPPONENT'S FALLACY IN TREATING CORPORATE STOCK AS A NOTE OR OBLIGATION.

As just quoted, opponent says of us (p. 71):

> "He cannot understand that the physical property of the corporation constitutes its assets while a share of stock in the hands of a shareholder is a liability of the corporation, in that it is an obligation upon which it is morally and legally bound to earn and pay to its owner dividends."

On page 33, opponent illustrates his position by treating a share of stock as if it were a *note*. He did not pursue his illustration, however, to its logical result for if a share of stock is, as he claims, an obligation like a note, then if Kentucky taxed notes held by residents of Kentucky, or omitted to tax them, depending upon whether or not the maker of the note owned property in Kentucky, or owned the specified and required amount, then, demonstrably, the statute would offend the Fourteenth Amendment. Such selection of the criterion of taxation would be entirely arbitrary and have no relation whatever to the subject of the legislation.

For illustration, if John Snooks, domiciled in Kentucky, held three notes, one made by Fred Lutz, of Ohio (25% of whose property was taxable in Kentucky); another by Robert Rich, of Indiana (75% of whose property was taxable in Kentucky); and the third made by Zeb Poore (none of whose property was taxable in Kentucky),—but all three of which makers

were amply solvent—the Kentucky Statute taxing notes held in Kentucky if the maker owned less than 75% of his property taxable in Kentucky (taxing two of the notes aforesaid and exempting the third) would clearly deny to the holder of the notes the equal protection of the laws as to the notes taxed, for the criterion of taxation would be absolutely arbitrary.

KIDD v. ALABAMA SHOWN INAPPLICABLE TO THE INSTANT CASE.

The case most relied on by appellee is *Kidd* v. *Alabama,* 188 U. S. 730.

The State there sued the shareholder for taxes on stock of railroad companies *incorporated in other States,* and the shareholder defended on the ground that no similar tax was levied on the stock of domestic railroads or of foreign railroads doing business in the State. In taxing the stockholders of domestic railroad companies and foreign railroad companies doing business in the State, the statute, set out in the APPENDIX, elaborately specified the method to be adopted in the assessments, and authorized deductions from assessed value of the shares of the aggregate amount of the assessed valuation of the real and personal property of the railroad companies assessed in the State. In as much as the shares of the plaintiff-in-error were in a foreign corporation neither having property nor doing business in Alabama, the plaintiff-in-error obtained no deductions in the valuation of his shares and complained that he was for that reason denied the equal

protection of the laws. What this Court said, therefore, must be construed in the light of the facts of the case. The State Court affirmed judgment for the State on authority of *State* v. *Kidd*, 125 Ala. 413, and the shareholder sued out a writ of error. This Court affirmed the judgment of the State Court. It said (p. 731):

> "If the argument went further and denied the right to tax on fiction at all, and therefore denied the right to tax foreign stocks, it would seem to us to have more logical force, although we are far from implying that it would be unanswerable, or that it can be regarded as open. Very likely such taxes can be justified without the help of fiction. *Sturges* v. *Carter*, 114 U. S. 511; *Dwight* v. *Boston*, 12 Allen, 316; *Dyer* v. *Osborne*, 11 R. I. 321. But the argument does not go to that extent, and, limited as it is, the proposition that the plaintiff in error is denied the equal protection of the laws for the reason which we have stated strikes us as wholly without force. We see nothing to prevent a State from taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. When we come to corporations formed and having their property and business elsewhere, the State must tax the stock held within the State if it is to tax anything, and we now are assuming the right to tax stock in foreign corporations to be conceded. If it does tax that stock, it may take into account that the property and franchises of the corporation are untaxed,

on the same ground that it might do the same thing with a domestic corporation. There is no rule that a State cannot look behind the present net values of different stocks. See *American Refining Co.* v. *Louisiana,* 179 U. S. 89."

After declaring that Alabama was not concerned with the taxing laws of other States, and that it would be fortunate if conflict between States could be avoided, this Court said (p. 732):

"But the Constitution of the United States does not go so far. *Coe* v. *Errol,* 116 U. S. 517, 524; *Knowlton* v. *Moore,* 178 U. S. 41; *Dyer* v. *Osborne,* 11 R. I. 321, 327; *Cooley Taxation,* 2d ed. 221, n. One aspect of the problem was touched in the case of *Blackstone* v. *Miller,* at the present term. 188 U. S. 187."

Mr. Justice Harlan and Mr. Justice White dissented.

Blackstone v. *Miller* was overruled in *Farmers L. & T. Co.* v. *Minnesota,* 280 U. S. 204, followed by *Baldwin* v. *Missouri,* 281 U. S. 586;—and *Sturges* v. *Carter* was not decided upon a Federal question but upon interpretation of the Statutes of Ohio. The Court there said (114 U. S. 521):

"The case, therefore, depends upon the construction of the statute. * * * The controversy on this part of the case is, therefore, reduced to the question, whether the legislature has clearly and unmistakably expressed the purpose in the act under consideration to exempt from taxation shares

in a foreign corporation owned by residents of Ohio, when but a small part of the property of the company was subject to taxation in Ohio."

In discussing the question the Court relied upon *Jones* v. *Davis,* 35 Ohio St. 474.

In order to manifest the applicability to the *instant* case of what this Court said in *Kidd* v. *Alabama,* opponent has gone elaborately into reports of the Kentucky State Tax Committees and evolved an ingenious theory from some quotations therefrom (Brief, 77, *et seq.*). He has thus justified the Act of 1917 fixing 25% as the amount of property which the corporations must have had in Kentucky to make non-taxable the stock of its shareholders; and he has justified the Act of 1924 fixing 75% of taxable property in Kentucky as the criterion of non-taxability by his comparison (Brief, 80, 81) of the situation which he deduces as existing in 1917 and the situation deduced by him in 1924. He concludes (Brief, 77, *et seq.*) that only about 20% of tangible personal property was assessed in 1917,—and intangible property hardly assessed at all,—and that 75% was assessed in 1924, so that the 75% criterion in the Act of 1924 was just as appropriate as was 25% as the criterion in 1917 of taxability of shares of stock.

Opponent says (Brief, 80, 81) that if appellant had examined certain pages of the report of the Tax Commission for 1923—

"* * * he would have discovered the reason why the 1924 Legislature by Chapter 116 of the Acts for

that year raised the percentage of property upon which a corporation was required to pay taxes, *because* its share of stock in the hands of shareholders could be exempt from taxation from 25% to 75%. This table discloses that the total assessed valuation of all the property of Kentucky in 1916 was $902,304,436, and that the valuation of this property had been continuously increased until in 1923, its total valuation was $2,205,588,007. Between the years 1916 and 1923 the valuation of the property of Kentucky had been *trebled,* and, in order to require the corporations operating in this State to be entitled to and have their stock exempted from taxation, since natural persons had *trebled* the valuation upon their property, it was nothing but fair that the corporation should be required to pay taxes upon at least three-fourths of their corporate assets before their shares should be entitled to exemption."

We submit that this proves absolutely nothing:

First, it does not prove that "natural persons had trebled the valuation upon their property." Opponent had shown that intangibles had increased as is above noted, from $68,750,880 in 1917 to $246,348,379 in 1918, the next year, and to $495,506,610 in 1928. Also, that bank deposits had increased from $11,177,196 in 1917 to $179,143,180 in 1918, the next year, and to $360,214,474 in 1928.

What part of the intangibles and what part of the bank deposits belonged to "natural persons" as distinguished from corporations, *quaere?*

Secondly, if the $902,304,436 total property in 1916 all belonged to natural persons (preposterous), and the $2,205,588,007 in 1923 all belonged to natural persons (equally preposterous), that circumstance would be utterly immaterial to the propriety of raising the criterion of the taxability of shares of stock from 25% in 1917 to 75% in 1924.

Thirdly, if the increase in the total taxable property of the State from 1917 to 1924 could affect the taxability of shares *in any wise* it could, *at most,* only affect *the percentage of the value of the shares* which should be taxed. *It could not indicate what shares should be assessed at 100% and what shares not assessed at all.*

For illustration, if *shares* were assessed at 25% of their real value in 1917 and assessed at 75% of real value in 1924, the State might, peradventure, try to explain the phenomenon upon the hypothesis that the *ratio* of assessed value to real value had increased in the seven years elapsed from 25% to 75%, but the figures exhibited by opponent would have no efficacy to show that to obtain non-taxability of shares the corporation having 25% of its property in Kentucky in 1917 must in 1924 have 75% of its property in the State.

Moreover a Tax Committee's report of 1912 shows that property was assessed on the average in Kentucky prior to 1917 at 52% of its value, and that real estate was assessed in different counties at different percentages of value, so that the tax report showed nothing, if

indeed it were possible for it to show anything, upon which to base the 25% or 75% of corporate property as a criterion for taxability of shares.

In *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499; *Louisville & Nashville R. Co.* v. *Greene*, 244 U. S. 522; and *Illinois Central R. Co.* v. *Greene*, 244 U. S. 555, this Court had before it cases where Cochran, J., enjoined 40% of the Kentucky assessment against the Railway Companies upon the ground that property in Kentucky was assessed at not exceeding 60% of its value, and was assessed on an average at 52% as shown by the Tax Committee's report. Judge Cochran said (230 Fed. 228) that the Commission appointed March 15, 1912, after nearly two years, stated the average *ratio* of assessed value to true value of farm lands at about 52%.

Opponent, however, in his endeavors to show applicability of *Kidd* v. *Alabama* to the *instant* case has failed to comprehend the real decision in that case. To do so it is necessary to read the Alabama Statutes upon which the decision was based. This Court said (188 U. S. 731):

> "The statutes levying the tax in question are the Code of 1886, §453, cl. 13, and the Code of 1896, §3911, cl. 14."

(These statutes are quoted in full in the appendix.) The *Code of 1886, §453, cl. 13,* reads:

> "All other property real and personal not otherwise specified herein."

The *Code of 1896, §3911, cl. 14,* reads:

> "All other property real and personal not otherwise specified herein including cotton, pig-iron, and manufactured goods, and other things of value."

The main statute prescribing the method of assessing shares is found in *Vol. I, §2082, cl. 9 of the Alabama Code of 1907,* adopted by Act of July 27, 1907, and is copied in full in the appendix.

Clause 9 provides in part as follows:

> "9. Every share of any corporation * * * shall be assessed at its actual market value, to the person in whose name such shares stand on the books of the corporation, and not to the corporation. * * * and the assessor, after passing upon such assessments, shall deduct from the aggregate amount or sum at which the whole of the shares are assessed the aggregate amount or sum at which the real and personal property of the corporation is returned to the tax assessors for taxation, owned by such corporation, and the residue of value remaining after such deduction shall be the assessed value of the whole of such shares, and such residue, divided by the whole number of shares, shall constitute the value of each share for taxation, * * *. If the aggregate value of the shares does not exceed the aggregate value of the real and personal property of the corporation as returned to the tax assessor for taxation, then no tax shall be demanded or collected on the shares; * * *."

This legislation of Alabama, construed in *Kidd* v. *Alabama,* was so widely different from the Kentucky Act of 1924 that the decision in *Kidd* v. *Alabama* is totally inapplicable in the construction of the Kentucky Act.

As shown in our original brief (p. 40) the State Court accepted the fallacy of opponent when it said (R. 59—230 Ky. 187):

> "But a large part of the property in any state is never assessed at its fair value. This is known of all men, and so the Legislature, when it came to consider whether stockholders in corporations should be taxed, where the corporation had paid taxes on all its property, did not require that the taxes should be paid by the corporation upon 100% of its property, but fixed a basis of 75 per cent. The reason was to allow a margin."

This statement involved an utter misconception of the situation. The Legislature did not fix "a basis of 75 per cent" for assessing shares, but required the shares assessed at 100% of value. The State Court had become confused between assessing shares at 75% of real value and assessing shares at 100% of such value where the corporation had less than 75% of its property in Kentucky. Neither the theory of opponent nor of the Court can account, therefore, for assessing shares at 100% where the corporation has 74% of its property in Kentucky, and exempting the shares altogether where the corporation has 75% of such property in Kentucky.

Seeing that neither opponent nor the Court can show why the Legislature changed the *criterion* of taxability from 25% in 1922, or 1923, to 75% in 1924, it becomes apparent that the increase was made arbitrarily, and, consequently, in violation of the equal protection clause of the Fourteenth Amendment.

In as much as *Kidd* v. *Alabama,* 188 U. S. 730, is now shown to have no applicability to the *instant* case, it would seem unnecessary to review the numerous cases cited by opponent (Brief, 48, 49), but in order to show that *Kidd* v. *Alabama* does not impair our position we shall briefly review the cases which opponent cites.

DISCUSSION OF CASES CITED BY OPPONENT AS REAFFIRMING KIDD v. ALABAMA.

In *Wright* v. *Louisville & Nashville R. R. Co.,* 195 U. S. 219, the decision was that the laws of Georgia did not exempt from taxation shares of stock of a foreign corporation held by a Georgia corporation. This Court said (p. 219):

> "Taking into account the decision in *Kidd* v. *Alabama,* 188 U. S. 730, the power of the State to tax the shares is not denied, so far as the Constitution of the United States is concerned, but it is argued that the State has not attempted to use that power by its present constitution and laws."

The question decided in *Kidd* v. *Alabama* was not discussed.

The question in *Union, &c., Transit Co.* v. *Ky.*, 199 U. S. 194, 205, was the right of Kentucky to tax the cars of a Kentucky corporation which operated locally between points outside Kentucky. This Court, holding that no such right existed, said (p. 205) that there was a distinction in respect of liability to such taxation between tangible and intangible property, and said:

> "In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam,* and to hold that the property may be taxed at the domicil of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such has been the repeated rulings of this Court. *Tappan* v. *Merchants' National Bank,* 19 Wall. 490; *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Bonaparte* v. *Tax Court,* 104 U. S. 592; *Sturges* v. *Carter,* 114 U. S. 511; *Kidd* v. *Alabama,* 188 U. S. 730; *Blackstone* v. *Miller,* 188 U. S. 189."

In *Armour Packing Co.* v. *Lacy,* 200 U. S. 226, 235, where a license was imposed upon *meat-packing* establishments, but the law did not extend to the sellers of meat nor to packing establishments other than meat, the Court, holding the classification reasonable, said (p. 235):

> "'A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intoler-

able burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings.' *Connolly* v. *Union Sewer Pipe Company,* 184 U. S. 540, 562.

"And see *Cargill Company* v. *Minnesota,* 180 U. S. 452; *Kidd* v. *Alabama,* 188 U. S. 730," and other cases.

In *Michigan Central R. R. Co.* v. *Powers, Auditor,* 201 U. S. 245, 293, this Court quoted from the Circuit Court the general rule on the subject of this Court's invalidating acts of State Legislatures under the Equal Protection Clause of the 14th Amendment, quoting divers cases including *Kidd* v. *Alabama.*

In *Liverpool, &c., Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, the Court (p. 355) quoted from *Kirtland* v. *Hotchkiss,* 100 U. S. 491, and added, "See also *Kidd* v. *Alabama*" (p. 356).

In *Darnell* v. *Indiana,* 226 U. S. 390, the Court held that statutes taxing shares in foreign corporations (except national banks, etc.) did not offend the Commerce Clause.

The Court advanced a *quaere* whether or not the statutes offended the Fourteenth Amendment. The Court held that one not within the class said to be discriminated against could not raise the Federal question, and held that a State might tax the property of domestic corporations and the stock of foreign corporations in similar cases (citing *Kidd* v. *Alabama*).

Concerning that case this Court said (p. 398) that the case was pretty nearly disposed of by *Kidd* v. *Alabama,* adding:

"But it is said that the former decision does not deal with the objection that the statutes work a discrimination against stock in corporations of other States contrary to principles often recognized (*Darnell* v. *Memphis*, 208 U. S. 113). The most serious aspect of this objection is that the statutes of Indiana do not make allowance if a foreign corporation has property taxed within the State. But as to this it is enough to say that, however the statutes may be construed in a case of that sort, the plaintiffs in error do not show that it is theirs, and that as they do not belong to the class for whose sake the constitutional protection would be given, if it would, they cannot complain on that ground."

In *Hawley* v. *Malden*, 232 U. S. 1, this Court, dealing with the question of *situs* of shares of stock, said that a State *in creating corporations* had the right to provide for taxation in that State of all the shares of stock, and whether owned by residents or non-residents; that whether, in case of such a corporation, a statutory provision fixing a *situs* of shares for purposes of taxation by whomsoever owned would exclude taxation of those shares by other States in which the owners resided, *quaere*.

The Court said (p. 10) that whether the question of constitutional validity of the taxation in question had been definitely raised in this Court or not, the existence of the State authority had been invariably assumed; that in *Kidd* v. *Alabama* it was not disputed that the State was entitled to tax shares owned by its citizens

in foreign corporations; that the argument there was that the statute created an unconstitutional discrimination, and this point being found to be without merit, the tax was upheld.

In *Fidelity & Columbia Tr. Co.* v. *Louisville,* 245 U. S. 54, 58, a tax imposed by the City was upheld upon the ground that the owner of money deposited in a bank in St. Louis was domiciled in Louisville; that the State of the owner's residence had the right to tax notwithstanding the money taxed was deposited in a St. Louis bank. This Court said (p. 58):

> "But liability to taxation in one State does not necessarily exclude liability in another." (Citing *Kidd* v. *Alabama.*)

Quaere whether or not this decision would stand in view of the much later rulings of this Court in *Farmers L. & T. Co.* v. *Minn.,* and *Baldwin* v. *Missouri, supra.*

In *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 330, held that a State might tax a domestic corporation on the excess of the market value of its outstanding stock over the value of its real and personal property and certain indebtedness, although the corporation did no business within the State and had there no tangible, real or personal property, nor any papers by which intangible property was customarily evidenced, and that it was immaterial whether the tax was considered a franchise or property tax.

After reviewing many cases, including *Fidelity, &c., Co.* v. *Louisville, supra,* the Court said that it was suf-

ficient to say, in answer to the taxpayer's objections, that the Fourteenth Amendment did not prohibit double taxation (citing *Coe* v. *Errol; Kidd* v. *Alabama,* and *Fidelity & Columbia Trust Co.* v. *Louisville*).

In *Watson* v. *State Comptroller,* 254 U. S. 122, *124,* held that a statute imposing additional tax on transfer of certain kinds of securities held by decedent at time of his death, on which neither general property tax nor the alternate stamp tax had been paid during a fixed prior period, was based upon a reasonable classification of property and did not violate the equal protection clause of the Fourteenth Amendment; that the tax was neither a property tax nor a penalty.

This Court said (p. 124):

> "It is insisted that the tax is discriminatory because under it other property of the same kind bequeathed to persons standing in the same relationship to the decedent will not be taxed. But the power to classify for purposes of taxation is fully established. The executors admit, as they must, that a classification is reasonable if made with respect to the kind of property transferred; or, to the amount or value of property transferred; or, to the relationship of the transferees; or, to the character of the transferee, for instance as engaged in charity. (Citing *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 300, and other cases.) * * * Any classification is permissible which has a reasonable relation to some permitted end of governmental action. It is not necessary, as the plaintiff in error seems to contend, that the basis of the classification must be deducible from

the nature of the things classified,—here the right to receive property by devolution. It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.' (Citing *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, 354; *Kidd* v. *Alabama, etc.*) And what classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had during the decedent's life borne its fair share of the tax burden and that which had not?"

In *Citizens National Bank* v. *Durr,* 257 U. S. 99, 109, it was held that the State of Ohio might tax the membership of a resident of that State in the New York Stock Exchange.

This Court said, on the point involving *Kidd* v. *Alabama* (p. 109):

> "Exemption from double taxation by one and the same State is not guaranteed by the Fourteenth Amendment (*St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 367-368); much less is taxation by two States upon identical or closely related property interests falling within the jurisdiction of both, forbidden. (*Kidd* v. *Alabama; Hawley* v. *Malden,* and the *Louisville case.*)

The authorities invoked by opponent as reaffirming *Kidd* v. *Alabama* do not show that *Kidd* v. *Alabama* has any application to the *instant* case.

The industrious Attorney General appears not only to have cited every case where this Court has mentioned *Kidd* v. *Alabama,* but he has referred to numerous

State Court cases (Brief, 50, 51) saying that such States have made the principle enunciated in *Kidd* v. *Alabama* an integral part of their tax systems; but in as much as we have shown that *Kidd* v. *Alabama* does not announce principles adverse to us in the *instant* case we shall not waste the time of the Court in reviewing the State Court cases thus cited in opponent's brief.

DIFFERENTIATION OF OHIO OIL CO. v. CONWAY, 281 U. S. 146.

Opponent (Brief, 56) touches lightly *Ohio Oil Co.* v. *Conway*, decided April 14, 1930, 281 U. S. 146.

The opinion in that case discussed extensively the question of the right to classify objects of taxation. The case was a bill to enjoin enforcement of a State statute enforcing a severance tax upon the products of oil. This Court affirmed the Federal District Court.

The classification approved by this Court was based on "gravity," a technical term in the oil business, and this Court notes that gravity constitutes a criterion in the price of oil. It says (p. 152):

> "Gravity as used in the Statute, and in oil price quotations, is not specific gravity, but what is called Baumé gravity, under which the lighter the oil the higher the gravity."

After elaborating characteristics of oils, this Court says (p. 155):

"The quotations that are according to gravity have a rising scale of prices as gravity increases."

Again (p. 158):

"The complainant contends that the Statute of Louisiana, imposing a tax according to gravity, operates as an arbitrary discrimination; that it discriminates in a wholly unjustifiable manner between the oils of the North Louisiana and South Louisiana fields, and also between the fields producing asphalt base oils. * * *

"The applicable principles are familiar. The States have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The States, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. * * *

"With all this freedom of action, there is a point beyond which the State can not go without violating the equal protection clause. The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary. The rule is gen-

> erally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Company* v. *Virginia,* 253 U. S. 412, 415; *Louisville Gas Company* v. *Coleman,* 277 U. S. 32, 37; *Air-Way Corporation* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240."

It is thus seen that this Court in the Conway case cited the late cases upon which we rely and the cases cited by this Court in those cases.

The authorities, therefore, cited by opponent have no effect to impair the argument made in our original brief.

COLLATION OF DEFINITIONS OF PROPER CLASSIFICATION FOR TAXATION.

In *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, *415,* the Court announced a latitude of discretion in classification, and said:

> "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

In *Truax* v. *Corrigan,* 257 U. S. 312, *337,* the Court said:

> "Classification must be reasonable. As was said in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,*

165 U. S. 155, classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis.' "

In *Air-Way Corporation* v. *Day,* 266 U. S. 71, 85, the Court said:

> "It is clear that the mere number of authorized non-par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made." (Citing authorities.)

In *Schlesinger* v. *Wisconsin,* 270 U. S. 230, *240,* the Court said:

> "A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid."

In *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, *37,* the Court said:

> "It (14th Amendment) does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circum-

> stanced shall be treated alike.' " (Citing Royster Guano Co. v. Virginia; Air-Way Corp. v. Day, and the Schlesinger case.)

In *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, *400,* the Court said:

> "The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' *Power Co.* v. *Saunders,* 274 U. S. 490, 493."

The definition of classification contained in the *Royster Guano Co. case* is repeated in *Louisville Gas & Electric Co.* v. *Coleman, supra,* where that case and others are cited.

In *Royster Guano Co.* v. *Virginia, supra,* the decision was in favor of the taxpayer, notwithstanding the Court there recognized that the discrimination made by the legislation was inadvertent and arose out of a comparison of two different statutes.

The *Air-Way Electric Company case, supra,* has been sufficiently reviewed in our brief (p. 42).

Schlesinger v. *Wisconsin, supra,* contains an important application of the principle of classification under the equal protection clause of the Fourteenth Amendment. State legislation had declared all gifts made within six years before death conclusively presumed to

have been made in contemplation of death and subject to inheritance tax. This Court declared the legislation an infraction of the Fourteenth Amendment (p. 240), saying that there was no adequate basis for the classification made, and—

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.' Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

REVIEW OF POWER CO. v. SAUNDERS, 274 U. S. 490, AND CITY OF DANVILLE v. QUAKER MAID, 211 KY. 677.

Power Co. v. *Saunders,* 274 U. S. 490, makes an interesting and important application of the equal protection clause of the Fourteenth Amendment. An Arkansas statute restricted venue in transitory actions against a domestic corporation to a county where it had a place of business or in which its chief officer resided; and venue in such actions against a natural person to a county where he resided or was found; but permitted similar actions to be brought against a foreign

corporation in any county of the State, and this Court held the legislation an infraction of the Fourteenth Amendment.

This Court said (p. 493):

> "It (the Fourteenth Amendment) does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

The Court said (p. 494):

> "The statutes mean foreign corporations doing business within the State by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served. We speak only of them. * * * So far as the plaintiffs in such actions (transitory actions) are affected, it is apparent that there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary."

In *City of Danville* v. *Quaker Maid,* 211 Ky. 677, 278 S. W. 98, cited in the *Quaker City Cab Co. case* (277 U. S. 394), the Kentucky Court held (1925) that $50 per year license imposed by ordinance, with $25 added for each additional employee more than two,

denied the Quaker Maid the equal protection of the laws because regular service groceries paid a license tax under the ordinance of only $12 per year, with $5 for each additional employee over two. The Court said (p. 679):

> "The details of credit and delivery are alone not enough to afford a reasonable basis for the classification attempted in this case."

It consequently appears that as late as 1925 the Kentucky Court was in accord with this Court on the true construction of the Fourteenth Amendment.

REPLY TO OPPONENT'S CRITICISM OF APPELLANT'S CLAIM BASED ON LOUISVILLE GAS & ELECTRIC CO. v. COLEMAN, 277 U. S. 32.

We are amazed at opponent's remarks (Brief, 90, 91):

> "The foregoing insinuation against the Court of Appeals of Kentucky and Commissioner Hobson, by appellant in his brief, is unfair, because the opinion in the Klein case, in neither the excerpt quoted from that opinion nor any other part of it states or suggests that the decision of this Court in the case of Louisville Gas & Electric Co. v. Coleman, *supra*, 'rested upon the ground that the long-time mortgages were made by corporations and short-time mortgages by the poor' or 'that the statute was void for taxing corporations and exempting individuals.' Neither did the opinion charge that this Court held 'that the statute taxed corporations and exempted individuals.' The excerpt

from the opinion, when construed fairly, only undertook to state what the Legislature of Kentucky, in adopting the mortgage recording tax, attempted to do, and that was to exempt the short term mortgages, which are usually executed by those in financial distress, and to tax the long-term mortgages, which are usually executed by corporations to a non-resident trustee as the basis for issuing a debenture bond, payable to bearer, with interest coupons attached. These were the two classes that the Legislature and the courts locally recognized in the passage of the mortgage recording act and its construction by the Court. *Locally the difference in the two classes was as significant as the difference between day and night, and Commissioner Hobson in the quoted excerpt was only stating a fact that was known and understood by practically every professional and business man of Kentucky."* (Italics ours.)

Opponent's temper which characterizes our discussion of the opinion of the State Court as an "insinuation" is unjustifiable. It has certainly never been considered by this Court that it was inadmissible for counsel to criticize the grounds upon which the lower Court decided the case. We offered no disrespect to the State Court nor to the Commissioner who delivered the opinion.

Concerning the justice of our opponent's remarks, we need only submit to this Court's perusal the excerpt which we made (Brief, 37) from the State Court's opinion (230 Ky. 187) (R. 59), and our comments upon it, in justification of our remarks.

We would especially observe, however, the latter part of the quotation which we have above made from opponent's brief, and his comparisons of the record in the *Coleman case* and the record in the *Citizens Telephone Company case* (Opp. Brief, 90, *et seq.*), and although we have not heretofore complained of the personal nature of opponent's language, nor of his basing his argument upon imaginary motives of the Legislature, we must protest against his not only rewriting the record in the *instant* case, but his rewriting that in the *Coleman case.*

REPLY TO OPPONENT'S CONTENTION THAT IF THE AMENDMENT OF 1924 TO SECTION 4088, KY. STATS., WERE HELD UNCONSTITUTIONAL ALL KENTUCKY STOCKHOLDERS IN ALL CORPORATIONS WOULD BE TAXABLE.

Appellee sounds us the alarm that if we establish what it claims to be our contention we shall nevertheless remain bound for the tax in controversy. It says (Brief, 94):

> "The main complaint of appellant in this case is that the exemption that is granted to a certain class of stockholders in Section 4088, Kentucky Statutes, is invalid. He states that this exemption is granted on an arbitrary classification. If this is true and the exemption is eliminated, then all stockholders will be required to pay the tax, and we cannot discover any advantage that would come to appellant by reason of invalidating the exemption under the 14th Amendment. This Court

would not undertake to invalidate the whole revenue measure because the exemption was invalid."

This is a *brand new* point. It was not made in the Court below, for that Court's elaborate opinion (R. 55-62) does not mention it.

The vice in appellee's position is:

First, in its assuming that our complaint is that it is an exemption contained in Section 4088, Ky. Stats., which is invalid, and

Secondly, in assuming that if Section 4088 were eliminated the shares of stock of appellant would be taxed under the Act of 1924. (a) Our complaint is not that there is an exemption contained in Section 4088, which is unconstitutional, but that the taxation of our shares when the shares of other corporations are not taxed makes taxation of ours unconstitutional. In other words, we claim that we are denied the equal protection of the laws by being taxed when shareholders in other corporations similarly circumstanced are not taxed. We, consequently, complain of the tax imposed on us.

(b) By holding Section 3 of the Amendment of 1924 (§4088) unconstitutional the shares held by appellant would not have thereby become taxable. Taxes are not imposed except by legislative command, and it is a cardinal principle of taxation, emphasized in Kentucky jurisprudence, that no tax exists except where imposed by positive legislation.

Board of Frankfort, &c., v. *Fidelity &c. Trust Co.,* 111 Ky. 667.

Same v. *Frankfort, &c., Trust Co.*, 115 Ky. 660, 664.
Aetna Life Ins. Co., et al., v. *Coulter, Auditor, et al.*, 115 Ky. 787-804.
Commonwealth v. *Dunn*, 126 Ky. 108, 111.
Commonwealth v. *Consolidated Casualty Co.*, 170 Ky. 103, 106.
Semple v. *Commonwealth*, 181 Ky. 675, 682.

In the *Frankfort case* the city attempted to tax the interest which the bondholders represented by the Trust Company owned in the mortgaged property in Frankfort. This Court had previously held in *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 422, that it was within the jurisdiction of the State to tax such an interest in realty within the State held by trustees for bondholders. It was accordingly contended by the city that the bondholders' interest in the mortgaged property, which was situate in the city, could be taxed by the city, on the ground that all property was taxable in Kentucky. The Court, however, held otherwise, saying that although the bondholders' interest in land situate in the State was an interest which might be made taxable, it was nevertheless not taxable because the Legislature had not made it taxable. This ruling, as aforesaid, was reaffirmed in the cases cited *supra*.

The *Frankfort case* was decided in 1901, long after the adoption of the Constitution of 1891 and the enactment of the Statutes of 1893 making general provisions for taxation of Kentucky property. It was established, therefore, as early as 1901 that shares of stock were

not taxable unless made so by positive legislation. The legislation on the subject was as early as 1886 (*prior to the present Constitution*), General Statutes 1887, Chapter 92, Art. IV, §8, as follows:

> "§8. That the individual stockholders of the companies which are by this article required to report and pay tax upon the value of their property, shall not be required to list their shares in such companies for taxation."

Before 1891 the previous Constitution (June 11, 1850) contained virtually no express limitations upon tax legislation.

The first statute on taxation after the adoption of the Constitution was the Act on Revenue and Taxation, November 11, 1892, Kentucky Statutes, Carroll's Edition 1899, pp. 1374-1396, §4088, as follows:

> "The individual stockholders of the corporation which are, by this article, required to report and pay taxes upon the corporate franchise, shall not be required to list their shares in such companies so long as the corporation pays the taxes on the corporate property and franchise as herein provided."

The statutory provisions of Kentucky were, therefore, both before and immediately after the adoption of the Constitution, identical in effect with the subsequently enacted Section 4085 of the Statutes (see our appendix, p. 51).

The Act of 1924, *now assailed by us,* not only does not assume to make all shares of stock taxable, but *per*

contra shares of stock in corporations having 75% or more of their property in the State are by that Act expressly made non-taxable. They were not taxable under the Act of 1917, nor under any prior legislation, and are not now taxable. Indeed, until appellee's *instant* contention no one ever claimed that they were taxable. If they were now made taxable by Section 4088's being held unconstitutional, then they must have been taxable ever since the adoption of the Constitution of 1891 and the Acts of 1893, but, on the contrary, it was repeatedly held that they were not taxable under the Act of 1893, or 1906 (§4085), or under the Act of 1917 (§4088), or under the present Act of 1924 (§4088, as amended).

It thus appears that prior to 1917 it was provided (§4085):

> "and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation."

This statute was repeatedly upheld and construed by the highest Court of the State.

Commonwealth v. *Fidelity Trust Co.*, 147 Ky. 77.
Slater v. *Commonwealth,* 166 Ky. 250, 179 S. W. 201.
Commonwealth v. *Muir,* and
Commonwealth v. *Halstead,* 170 Ky. 435, 186 S. W. 104.

The case of *Commonwealth* v. *Walsh's Trustee,* 133 Ky. 103, is enlightening on the *instant* point. Miss

Clara Beall, afterward Mrs. Walsh, owned 500 shares of Western Union Tel. Co. stock and the State attempted to tax it. The trial Court held the stock nontaxable and the State appealed. The Court of Appeals gave an opinion reversing (p. 104). Upon petition for rehearing the former opinion was withdrawn and the trial Court's decision affirmed (p. 111).

The Court said (pp. 112, 114, 115):

> "Throughout the whole scheme of taxation adopted by this State there is an evident purpose to avoid double taxation, not alone in not taxing the same property twice in the same year for the same purpose, but as well in not taxing the same thing, whatever its form, twice in the same year for the same purpose. Double taxation is recognized as oppressive, and, where it is imposed upon some classes of property and not upon others, works an inequality that is fundamentally vicious. While the Constitution requires that all property shall be taxed (Const., Sec. 171) and the General Assembly is prohibited from exempting any property from taxation not specifically exempted by Section 170 of the Constitution, it is not required that every phase of property shall be taxed. *Nor is it. Nor has it ever been.* Property is the right to or interest in a thing. * * * *The manner of classifying* property for purposes of taxation, so as to tax all that is not exempted by the Constitution, *is a matter left to the legislative wisdom.* While it would be permissible without double taxation as that term is used, to tax the corporation upon its capital, and the shareholder upon his share, or the life tenant upon his estate, and the

remainderman upon his, whether the State should resort to that form, or to the simpler one of taxing once and at full value the thing which represents the various properties based upon it, *is a matter of legislative discretion always.* It may be remarked that no State taxes every right or interest in things which the law recognizes as property. * * * *In no instance does the State require the corporations and the shareholder* to each pay the tax upon the actual property, the title to which is in the corporation. *On the contrary, it is expressly provided in every instance that, where one pays the tax, the other need not. It is a misnomer to say that that is an exemption from taxation. It is not.* It is choosing the form of the property from among several forms it may have assumed, which the State prefers for its own convenience and security to lay the tax upon.

"* * * While it is true that the State may have taxed the franchise, which includes the capital of the corporation, and taxed also the shareholder upon his shares (Franklin Co. Ct. v. Deposit Bank, 87 Ky. 370), it has not done so. On the contrary, it has expressly said (Ky. St., Sec. 4088, *supra*) that so long as the corporation pays taxes upon its corporate franchise and property the shareholder shall not be required to list his shares in such company." (Italics ours.)

This language of the Kentucky Court is so clear, emphatic and comprehensive that comment is unnecessary.

It results that appellee's contention (in *terrorem*) that if the amendment of 1924 be held unconstitutional

then all shares of all corporations in Kentucky would be taxable, is not maintainable, and that its contention never was the law of Kentucky.

Moreover, inasmuch as the Standard Sanitary Mfg. Co., in which appellant holds the shares under discussion, had more than 25% of its property in Kentucky (R. 58) appellant's shares were not taxable under the Act of 1917. Consequently, if all the corporate shares were now taxable this could only be through positive command of the Act of 1924, and the provisions of that Act not only do not purport to tax them but, on the contrary, expressly make shares non-taxable unless the corporation has less than 75% of its property taxed in Kentucky.

The Act of 1924 does not purport to tax all shares of all corporations. It lays a 30c tax on real estate and a 50c tax not upon all other property, but upon "all other property directed to be assessed for taxation as provided by law" (appellee's appendix, p. 121). It then distributes the tax levied. The Act next provides repeal of Section 3 of the Act of 1917 and substitution of Section 3 of the Act of 1924 (pp. 123, 124). The Act then proceeds to repeal certain sections of the Act of 1917 and to substitute other provisions.

In the provisions under that Act for retrospective assessment of omitted property (appellee's appendix, p. 129), the property for back assessment is described as "money * * * or shares of stock *liable to assessment.*" (Italics ours.)

An analysis of the specific provisions of the Act, therefore, shows that it contains no positive imposition of taxes upon shares except as is expressed in the provisions hereinbefore recited.

Conclusive against appellee, however, on the *instant* point is that the point was not raised, and therefore was neither considered nor decided in this case by the State Court, and being a construction of State statutes this Court will not consider it. On the contrary, the entire opinion of that Court, as well as the decision which it made, was adverse to appellee's contention. Indeed, the State Court's act in deciding the Federal question was equivalent to deciding the *instant* question adversely to appellee.

Furthermore, the reasons given by the State Court, in its opinion, for its decision in favor of appellee prove that appellee's present contention is untenable, *for the State Court showed that under Kentucky law the shares in some corporations were taxable and the shares in others non-taxable,* something that could not obtain if the shares of *all* corporations were taxable, as is now claimed by appellee. For illustration, the State Court said (R. 59):

> "There is a substantial reason for putting stockholders in corporations not paying taxes in Kentucky on so much of their property on a different footing from those so paying taxes in Kentucky. When the corporation's property is all in Kentucky and its property is all assessed and the taxes are paid thereon, the property so taxed has

> in fact borne its fair share of the public burden. Not to assess the stockholders on his stock then is simply to treat the corporation as a firm is treated."

The State Court, in the language just quoted, so far from holding that all shares of stock were taxable, based its decision upon a classification of shares (some taxable and some non-taxable) which it held was not unconstitutional. The classification thus expounded by the State Court held taxable all shares where the corporation had less than 75% of its property taxed in Kentucky, *and non-taxable where the corporation had 75% or more of its property taxable in Kentucky.*

The State court's decision, consequently, in the *instant* case was exactly in line with the *Frankfort case* and the *Walsh case,* and the cases cited *supra* following the *Frankfort case.*

The State Court, in the language above quoted, in appellee's own case has conclusively decided the *instant* point against appellee, and the point is an afterthought.

An additional ground of decision against appellee is that if a decision affirming the unconstitutionality of Section 4088, as amended in 1924, had such effect as appellee claims, the result would simply be the revival of the corresponding section of the Act of 1917. That Act doubtless contained the same infirmity as the Act of 1924, *but has never been attacked, and is not now under attack.* If, however, Section 4088 of the Act of 1917, as well as Section 4088 of the Act of 1924, were

each tried and held unconstitutional the result would be to revive Section 4085 aforesaid, under which shares were not taxable so long as the corporation paid taxes on whatever property it had in Kentucky.

Ward v. *Commonwealth,* 228 Ky. 468, 471, and cases cited.

The Act of 1917 (*appellee's* appendix, p. 111) contains no such provision for separability as does Section 11 of the Act of 1924 (appendix, p. 131), but had it contained such a provision the result would have been the same.

If, as aforesaid, Section 2 of the Act of 1924, amending Section 3 of the Act of 1917, were held unconstitutional the effect would be to revive Section 3 of the Act of 1917. If, in turn, Section 3 of the Act of 1917 were held unconstitutional (but is not now on trial), the result would be to revive Section 4085 (Appendix *appellant's* brief, p. 57).

If Section 3 of the Act of 1917 were held unconstitutional the entire provisions of that Act respecting the taxation of shares would fall and, consequently, the provisions of Section 11 (*appellee's* appendix, p. 119), repealing Section 4085 and Section 4088, would fall. In any aspect of the case, therefore, Section 4085 would remain and appellant's shares would not be taxable. The reason for this result is clear, *viz.,* that the provision for repeal of Section 4085 was based upon the legislative intent in the Act of 1917 to tax only the shares of corporations having less than 25% of the corporation's property in Kentucky, *and there was no intent*

to tax any other shares. To hold otherwise than as we suggest above would commit the Legislature to taxing all shares in Kentucky, something which, as said in the Walsh case, had never been done, and as said *supra* taxation of any particular property must be by positive legislation.

Commonwealth v. *Hatfield Coal Co.,* 186 Ky. 411, 217 S. W. 125 (applying *Poindexter* v. *Greenhow,* 114 U. S. 270; *Spraigue* v. *Thompson,* 118 U. S. 90; and *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540).

Felts v. *Linton, Judge,* 217 Ky. 305, 310, 311, 289 S. W. 312.

The discussion of the repeal and revivor, however, is an alternative argument, and is merely corroborative of the argument previously advanced on this point, *viz.,* that positive legislation is essential to create taxation and that none exists, or ever has existed, in Kentucky that would tax appellant's stock except the un constitutional provisions of the Act of 1924.

APPELLEE'S REASON WHY THE LEGISLATURE CHANGED SECTION 3 OF THE ACT OF 1917 REFUTED.

Appellee indulges in its brief in much imaginative historical speculation *dehors* the record. It says (p. 98):

> "Thus the Legislature discloses that the 1924 amendment to Chapter 11 of the 1917 Act was adopted to equalize the burden of taxation. After the assessment of the property of individuals had been trebled it would have been unfair to other

property holders to have permitted shares of stock to be exempted when the corporation paid taxes to Kentucky on 25% of its tangible assets. So they raised the percentage of property to be taxed to 75%."

The record discloses nothing to support this statement, but, on the contrary, the tables in the appendix to appellee's brief show, and the introduction to the brief shows, why the Act of 1917 (passed in pursuance of the Amendment of 1915 to Constitution, Sec. 171) imposed a tax on intangibles which the holders thereof would pay, and repealed the absurd tax burdens previously existing and which owners of intangibles would not pay. Such owners would either refrain from owning intangibles or would conceal them, and in either case the State could not tax them. The history of the Act of 1917 as given by appellee establishes this statement.

It profiteth nothing to become excited over the immorality of the holder of a $100 bond, assessed at par and bearing 3½, 4½ or 5% interest, failing to pay a tax of $3.05 (appellee's brief, 5), because the Court judicially knows, what everybody knows, that the most progressive and enlightened States have recognized that holders of intangibles will not pay unreasonable taxes but will escape them honestly or dishonestly, because they can. It was, of course, in the intelligent recognition of this fact that the 1915 Amendment to Constitution, Section 171, was adopted, and the Act of 1917, imposing on intangibles only a State tax of 40c (now

50c) enacted. The result is recited by appellee (Brief, 4):

> "In 1917 bank deposits reported for taxation in Kentucky were $11,177,196. In 1918 they were $179,143,180. In 1917 intangibles were $68,750,880, while in 1918 the intangibles were $246,348,379. In 1928 bank deposits were $360,214,474 and intangible personal property $495,506,610."

The subject of taxation is, and in 1917 was, economic and not religious. Its treatment was by constitutional amendment and by Act of the Legislature. There is no justification or excuse, therefore, for attack upon appellant or any other holder of shares of stock residing in Kentucky. The tax laws of Kentucky were made by the Commonwealth and not by the shareholders.

CONCLUSION.

We conclude that opponent's brief has in no wise impaired the case made by our original brief, and that our reply brief has not only answered the brief of opponent but has strengthened our original brief by further argument and citation of applicable decisions of this Court.

We submit that we have shown by the decision of this Court in the *Quaker City Cab Company case, supra,* and its decision to similar effect in divers other cases, that a discrimination in taxation in favor of an individual and against a corporation cannot be sustained except where the taxation upon the corporation or its property is based upon some characteristic of the

corporation not possessed by the individual, and that to hold otherwise would destroy the equal protection clause of the Fourteenth Amendment, the corporation being a "person" within the meaning of that amendment; and we submit that this principle applies with even greater force to a legislative attempt to discriminate arbitrarily between corporations themselves.

We submit that we have shown that *Louisville Gas & Electric Co.* v. *Coleman, Auditor, supra,* announces a principle exactly applicable to the *instant* case, because the classification of shareholders in the latter has no basis whatever except a difference in amounts of gross assets owned by the corporation situated in the State as a criterion between taxability and non-taxability.

Under the legislation assailed by us in the *instant* case the shares of stock in a corporation are taxable if the corporation has only 74% of its gross assets in Kentucky, while shares are not taxable if the corporation has 75% thereof in the State. Any amount other than 75% of such assets might have been selected with equal propriety, and would have been selected equally arbitrarily. The principle of the *Coleman case* is, consequently, exactly applicable, and is conclusive.

Again, we have shown (Brief, 29, 36) that *gross assets* can afford no just criterion for classification in cases like the *instant* case, and can afford a no more reasonable criterion for classification for taxation than "authorized" capital stock was permitted to show in *Air-Way Electric Co.* v. *Day, supra,* or the statutory

requirement of stock-holding in *Liggett* v. *Baldridge* (Brief, 42, 43).

The fundamental principle of the equal protection of the laws commanded by the Fourteenth Amendment has served as a bulwark against confiscation of property through discriminatory taxation and through ignorant or prejudiced rate-making for many years, as well as against other arbitrary or tyrannical legislation, and has been of inestimable value to the people. In times of stress or great excitement State Legislatures in the midst of a crisis not only welcome the consolation that this Court will review their work, but cheerfully pass on the responsibility to the State Courts or to this Court. Indeed, the protection which this Court has always given to the people under the Fourteenth Amendment has been invaluable.

We respectfully pray that the judgment appealed from be reversed.

JUNIUS C. KLEIN,
JOHN P. HASWELL,
BLAKEY HELM,
EDMUND F. TRABUE,
Counsel for Appellant.

JOHN S. MILLIKEN,
Of Counsel.

APPENDIX.

Alabama Code of 1886, §453, cl. 13:

"All other property real and personal not otherwise specified herein."

Alabama Code of 1896, §3911, cl. 14:

"All other property real and personal not otherwise specified herein, including cotton, pig-iron, and manufactured goods, and other things of value."

Alabama Code of 1907, Vol. 1, §2082, cl. 9:

"9. Every share of any corporation except banks or banking associations and building and loan associations shall be assessed and collected in the county wherein such corporation has its home or chief office in this state, and shall be assessed at its actual market value, to the person in whose name such shares stand on the books of the corporation, and not to the corporation. The president or chief officer of every such corporation shall make out and return under oath to the assessor of the county in which the chief or home office of the corporation is located, a list showing the total number of such shares of capital stock of such corporation and the par value thereof, and the full name and residence of each shareholder as far as known, the actual market value of such shares and the par value thereof, the date of the last sale of stock in such corporation, with the name of the seller and the purchaser, and the price paid for the same, and the annual dividend declared on the stock of such corporation for the last three years, the value of the shares as shown by the books of the corporation, and by the last report of the officers to the shareholders, the amount of the surplus; and the amount of the un-

divided profits not included in the surplus, and such president or chief officer shall at the same time return to the assessor a sworn statement of all taxable property, real and personal, owned by such corporation, situated in the State, and the value thereof as returned to the tax assessor for taxation the same year, and the assessor, after passing upon such assessments, shall deduct from the aggregate amount or sum at which the whole of the shares are assessed the aggregate amount or sum at which the real and personal property of the corporation is returned to the tax assessors for taxation, owned by such corporation, and the residue of value remaining after such deduction, shall be the assessed value of the whole of such shares, and such residue, divided by the whole number of shares, shall constitute the value of each share for taxation, and the corporation shall pay for the shareholders the tax assessed against his shares, and the amount so paid for any shareholder shall be a lien on any interest which such shareholder may have in any property owned by the corporation. If the aggregate value of the shares does not exceed the aggregate value of the real and personal property of the corporation as returned to the tax assessor for taxation, then no tax shall be demanded or collected on the shares; and no other deductions shall be made from the aggregate amount or sum at which the real and personal property of the corporation is returned to the tax assessor for taxation than is herein specifically provided for. It shall be no ground for objection to such assessment of shares that the same is entered upon the assessment books in the name of the corporation. In arriving at the value of the shares of stock of a corporation organized under the laws of Alabama for the purpose of conducting a fire insurance business for assessment, there shall be deducted from the value of such shares, in addition to the assessed value of its property, the amount of its bonds of the State of Alabama, any county or municipality thereof, and of the United

States, held by such fire insurance corporation at the time of such assessment, which was held during all the six months preceding such assessment; provided no shareholder of any corporation who shall pay a tax on franchise or intangible property shall be liable to the taxes specified in this subdivision as to the same property."